No. 84-495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD THORNBURGH, H. ARNOLD MULLER, HELLEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM R. DAVIS, LEROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants

vs.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. FOR APPELLANTS RICHARD THORNBURGH, ET AL.

Steven R. Valentine
of the Bar of the
Supreme Court of
Illinois
8029 Edinburgh Drive
Springfield, VA 22153
(703) 455-6125

James Bopp, Jr.
Brames, Bopp, Haynes & Abel
191 Harding Avenue
P.O. Box 1583
Terre Haute, IN 47808-1583
(812) 238-2421

Attorneys for Amicus Curiae

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NOTE

This Brief Amicus Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed herewith with the Clerk of this Court.

STATEMENT OF INTEREST OF AMICUS CURIAE NATIONAL RIGHT TO LIFE COMMITTEE, INC.

The National Right to Life Committee, Inc. is a non-profit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and more than 2,000 local chapters made up of individuals from every race, denomination, ethnic background and political belief. It engages in various political, legislative, legal and educational activities to protect and promote the concept of the sanctity of human life.

The members of the National Right to Life Committee, Inc. have been the prime supporters of laws restricting abortion on demand to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee have supported legislation to protect unborn human life within these guidelines. The Pennsylvania Abortion Control Act is the result of lobbying, in great part, by the members of the National Right to Life Committee, Inc. and its affiliate, the Pennsylvania Pro-Life Federation. By means of this brief, the National Right to Life Commitee, Inc. seeks to advance these interests by supporting the Pennsylvania post-viability abortion regulations herein.

BRIEF AMICUS CURIAE NOTE

The Questions Presented and The Statement of the Case are omitted from this Amicus Curiae Brief since they are amply stated .n the Appellants' Brief of Richard Thornburgh, et al.

SUMMARY OF ARGUMENT

The right of a woman to choose to terminate her pregnancy, while constitutionally guaranteed, is not absolute, and does not include the right to ensure that an abortion performed after the point of viability of the fetus results in delivery of a dead fetus rather than a live child. In the face of the compelling state interest in protecting unborn viable human life recognized in *Roe v. Wade*, 410 U.S. 113 (1973), regulation of abortion practices such as that enacted in 18 PA. CONS. STAT. §3210(b) is justified.

Section 3210(b) mandates, in the post-viability abortion context, that the attending physician use the abortion procedure most likely to result in a live birth unless that procedure entails a significantly greater risk to the life or health of the pregnant woman. In assessing the medical risk, the physician may not consider the psychological or emotional effect on the woman if her child is delivered alive rather than dead. It is a reasonable exercise of Pennsylvania's power, pursuant to its compelling interest in viable unborn life, to require at least a significant increase in the risk to maternal life or health before allowing the life of the viable fetus to be terminated.

Pennsylvania's exclusion from the physician's consideration of the psychological or emotional impact of live birth in assessing medical risk is justified by principles previously articulated by this Court concerning the definition of maternal "health" in the abortion decision context. The broad definition of maternal health set forth in *Doe v. Bolton*, 410 U.S. 179 (1973), has only been applied by this Court to first-trimester abortion situations. This Court made it clear in *Roe v. Wade* and its progeny that the maternal health considerations during the first trimester of pregnancy, which justify abortions for a broad range of reasons, are not the same as those at the point of viability. To reason otherwise would negate the state's compelling interest in potential life recognized by this Court at viability. The employment of the phrase "significantly greater medical risk" in Section 3210(b) is an appropriate

way for Pennsylvania to differentiate between the broad definition of maternal health in the first trimester and the markedly different and more grave nature of the post-viability health exception.

ARGUMENT

I

IN REGULATING THE ABORTION OF A VIABLE FETUS, THE STATE MAY REQUIRE THAT THE PHYSICIAN EXCLUDE FROM CONSIDERATION INSIGNIFICANT PHYSICAL HEALTH RISKS TO THE WOMAN AND MATERNAL FEAR OF A LIVE BIRTH IN SELECTING THE METHOD OF ABORTION.

This *amicus curiae* brief will address the sole issue of whether the Court of Appeals for the Third Circuit erred in its determination that 18 PA. CONS. STAT. ANN. §3210(b) (hereinafter "Section 3210(b)") is unconstitutional under the precedents of this Court. *American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 737 F.2d 283, 300 (1984). In its entirety, Section 3210(b) provides as follows:

> Degree of care. — Every person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care and diligence which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive *unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique* and the physician reports the basis for this judgment. *The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother.* Any person who intentionally, knowingly or recklessly violates the provisions of this subsection commits a felony of the third degree (emphasis added).

Addressing itself to the constitutionality of Section 3210(b), the court below cited *Colautti v. Franklin*, 439 U.S. 379 (1979), and asserted that in it this "Court held that the earlier Pennsylvania statute impermissibly required the doctor to make a 'trade-off' between the woman's health and . . . fetal survival." *Thornburgh*, 737 F.2d at 300, citing *Colautti*, 439 U.S. at 400. Arguing that the "new Pennsylvania statute, like the old, fails to require that maternal health be the paramount consideration," the court below focused on the legislature's use of the word "significantly" and found that the challenged statute "is not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus, and therefore . . . (is) unconstitutional." *Thornburgh*, 737 F.2d at 300.

A. The Woman's Right of Privacy Does Not Include the Right to Ensure the Destruction of a Viable Fetus

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that the right of personal privacy included the right of a pregnant woman to decide whether or not to have an abortion. Therefore, this Court invalidated a Texas statute which prohibited all abortions except those procured for the purpose of saving the life of a mother. 410 U.S. at 164. In the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), this Court, among other things, struck down Georgia's abortion statute which required that the abortion must be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals. 410 U.S. at 194. After noting that such a requirement is not imposed on the performance

of nonabortion surgery, *id.* at 193, the Court found that it violated the equal protection of laws because it was not "based on differences that are reasonably related to the purposes of the act in which it is found." *Id.* at 194.

However, in establishing that there are compelling state interests in potential life and maternal health which allow the state to regulate abortion, this Court has emphatically declared that, while there is a constitutionally protected interest in making certain kinds of important decisions "free from governmental compulsion," *Whalen v. Roe*, 429 U.S. 589 (1977), these protected rights are "not absolute." *Carey v. Population Services International*, 431 U.S. 678 (1977). "As *Whalen* makes clear, the right in *Roe v. Wade*, *supra*, can be understood only by considering both the woman's interest and the nature of the state's interference with it. *Roe* did not declare an unqualified 'constitutional right to an abortion....' Rather, the right protects the woman from unduly burdensome interferences with her freedom to decide whether to terminate her pregnancy." *Maher v. Roe*, 432 U.S. 464, 473-74 (1977). In addition, "not all distinction between abortion and other procedures is forbidden." *Bellotti v. Baird I*, 428 U.S. 132, 145 (1976). The constitutionality of such distinction will depend upon the degree and the justification for it. *Id.* Abortion, unlike other medical procedures, involves the termination of potential human life. *Maher v. Roe*, 432 U.S. at 480.

The woman's right recognized in *Roe* was the right to an abortion in the sense of a right to empty the womb of the unwanted fetus and not in the sense of a right to ensure that the fetus will die in the process. Professor Rhoden has recognized this vital distinction. She observes, "Writers on abortion have generally assumed, reasonably enough, that removing the fetus from the womb ('womb-emptying') would necessarily result in its destruction ('feticide'). In the live birth situation, however, womb-emptying and feticide have diverged; removing the fetus has unexpectedly failed to destroy it." Rhoden, *The New Neonatal Dilemma: Live*

Births From Late Abortions, 72 GEORGETOWN LAW J. 1451, 1453 (1984) (footnote omitted). The same point is made by Laurence Tribe. "Once the fetus can be severed from the womb by a process which enables it to survive," wrote Professor Tribe, "leaving the abortion decision to private choice would confer not only a right to remove an unwanted fetus from one's body but also an entirely separate right to ensure its death. Apart from the problematic nature of any claim in behalf of the latter right, its recognition and enforcement would be indistinguishable from recognizing and enforcing a right to commit infanticide...." Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARVARD LAW REV. 1, 27 (1973) (footnote omitted).

No court has held that the abortion privacy right is a right to commit feticide. On the contrary, such a notion has been specifically rejected. In *Wynn v. Scott*, a state statute was under consideration which mandated, in the court's construction, that "[i]f...there are instances where a physician has a choice of procedures, both of equal risk to the woman, the physician must choose the procedure that is least likely to kill the fetus." 449 F.Supp. 1302, 1321 (1978), *aff'd. sub nom. Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979). "This choice," Prentice Marshall wrote for a unanimous court, "would not interfere with the woman's right to terminate her pregnancy. *It never could be argued that she has a constitutionally protected right to kill the fetus. She does not.*" *Id.* (emphasis added).

B. The State's Interest in Protecting the Life of a Viable Fetus is Compelling

This Court has found that the State has a legitimate interest in potential life. This interest "grows in substantiality as the woman approaches term and, at a point during pregnancy ... becomes compelling." *Roe v. Wade*, 410 U.S. at 163. "At viability, usually in the third trimester, the state's interest in potential life of the fetus justifies

prohibition with criminal penalties, except where the life or health of the mother is threatened." *Maher v. Roe*, 432 U.S. at 472.

At viability, the unborn child can live independently outside the mother's womb. Thus, this Court has recognized that the state interest in protecting the unborn child, at viability, becomes dominant and the state may go so far as to proscribe the abortion procedure. *Roe v. Wade*, 410 U.S. at 155. As stated by this Court in *Roe v. Wade*, "[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo, and later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a state to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly." *Roe v. Wade*, 410 U.S. at 159 (citation omitted).

C. The State's Compelling Interest in Protecting the Viable Fetus Supports the Requirements of Section 3210(b)

Section 3210(b) mandates, in the post-viability abortion context, that the attending physician use the abortion procedure most likely to result in a live birth unless that procedure entails a significantly greater medical risk to the life or health of the pregnant woman. In assessing the medical risk, the physician may not consider the psychological or emotional effect on the woman if her child

is delivered alive rather than dead.[1]

Section 3210(b) is not unconstitutional in light of *Roe v. Wade*. Pennsylvania's interest in protecting viable unborn life is compelling. It is a reasonable exercise of the state's power pursuant to that interest to require at least a *significant* increase in the risk to maternal life or health before allowing the life of the viable fetus to be terminated. Significant means "having meaning." WEBSTER'S NEW COLLEGIATE DICTIONARY 1071 (1981). Its antonym is "unimportant." ROGET'S COLLEGE THESAURUS 326 (1962). Thus, the State of Pennsylvania rejects only an "unimportant" or meaningless increase in the health risk to a woman as a basis for nullifying its compelling interest in the life of a fetus with a reasonable likelihood of survival.

After viability, the unborn child could survive outside the mother's womb and the state has a compelling interest in protecting that potential life. If the "compelling interest" has any meaning, it must support a requirement increasing the likelihood of fetal survival when there is only an insignificant and unimportant increase in the health risk to the mother. Some post-viability abortion methods virtually always result in fetal death while the live birth rate for other methods may vary by five to forty times. Grimes, *Second-Trimester Abortions in the United States*, 16 FAM. PLAN. PERSPECT. 260, 264 (1984); Grimes and Cates, *The Comparative Efficacy and Safety of Intraamniotic Prostaglandin F2a and Hypertonic Saline for Second-Trimester Abortion*, 22 J. REPRO. MED. 248, 252 (1979). In contrast, the risk of mortality to the woman varies from

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[1] Section 3210(b) could reasonably be construed to mandate only that the physician may not base his decision to use an abortion procedure other than the procedure most likely to result in a live birth *solely* on the possibility of psychological or emotional harm to the woman if her child is delivered alive rather than dead. Such a construction would avoid the claim that the section imposes increased medical risks on the woman. For the purpose of this brief, however, the construction adopted by the Third Circuit is used.

12.0/100,000 to 14.2/100,000 for some of the most common post-viability abortion methods. *Second-Trimester Abortions*, *supra*, at 263. There is, therefore, a tremendous increase in the likelihood of fetal survival by use of certain abortion methods rather than others while the risks to the mother vary only thousandths of a percent.

The state's interest in post-viability unborn life is not theoretical. In 1981, for instance, there were 13,790 abortions after 21 weeks of pregnancy and 49,600 between 16 and 20 weeks. Henshaw, *A Portrait of American Women Who Obtain Abortions*, 17 FAM. PLAN. PERSPECT. 90, 92 (1985). In addition, the neonatal survival rates are steadily pushing the age of viability well into the second trimester. *See* Appendix A. Recently, a modification of a pre-existing abortion method has been developed purposely to ensure fetal death and is being used even though it increases the risk to the health of the mother. *See* Haning & Peckham, *Evaluation of Intra-Amniotic Administration of 120 gm of Urea with 5 mg of Prostaglandin F2α for Midtrimester Termination of Pregnancy Between 20 and 24 Weeks Gestation*, 151 AM. J. OB. GYN. 92 (1985); Binkin, et al., *Urea-prostaglandin Versus Hypertonic Saline for Instillation Abortion*, 146 AM. J. OB. GYN. 947, 951 (1983). There are, therefore, a substantial number of viable unborn children whose lives are at stake and whom the state has a compelling interest to protect.

If the state may not protect viable unborn life in the face of an insignificant and unimportant increase in the health risk to the woman, its so-called "compelling" interest in post-viable fetal life is in practice devoid of force and meaning. This view cannot be squared with this Court's careful search for a compelling interest in *Roe* which would have supported a severe criminal sanction for any abortion not performed to protect the life of the pregnant woman. *Roe v. Wade*, 410 U.S. at 156-164. If such a compelling interest could have been found by this Court in the first trimester, the Texas statute making abortion a criminal offense

would have been upheld. *Maher v. Roe*, 432 U.S. at 472. The existence of such a compelling interest after viability is sufficient to protect the life of the fetus when there is only a meaningless increase in risk to the woman's health.

In addition, Section 3210(b) provides that, in assessing the significance of the increase in the risk to the life or health of the pregnant woman, the physician may not consider any alleged psychological or emotional harm to the woman if her child is delivered alive rather than dead. As outlined above, *Roe* does not recognize a constitutional privacy right to commit feticide. Rather, the pregnant woman has a privacy right to terminate her pregnancy in the post-viability period by emptying her womb. Fear of a live birth, if considered sufficient to allow abortion procedures which result only in fetal death, would have the effect of radically altering the *Roe* right and thereby vitiating the state's compelling interest in unborn life.

Roe gave the woman the right to terminate her pregnancy, not to kill her child. Indeed, *Roe* gave the states the right to protect the lives of unborn children beginning at the very time when live births are possible. It is thus appropriate that the Commonwealth of Pennsylvania exclude fear of live births as a factor in seeking to favor live births.

II

ROE V. WADE DOES NOT REQUIRE THE STATES TO ALLOW POST-VIABILITY ABORTIONS UNDER THE BROAD DEFINITION OF HEALTH FOUND IN *DOE V. BOLTON*.

In selecting the procedures most likely to result in the live birth of a post-viable fetus, Section 3210(b) excludes consideration of "the potential psychological or emotional impact on the mother of the unborn child's survival." Thus, in the exercise of its compelling interest in preserving viable fetal life, Pennsylvania has excluded consideration

of the fear of a live birth in the assessment of the "medical risk to the life or health of the pregnant woman."

In recognizing a compelling interest in fetal life, this Court provided that a state may prohibit abortion after viability except when an abortion "is necessary to preserve the life or health of the mother." *Roe v. Wade*, 410 U.S. at 164. In *Doe v. Bolton*, this Court defined health to include factors that are "physical, emotional, psychological, familial, [as well as] the woman's age." 410 U.S. at 192. The court below, however, in a fundamentally erroneous manner, held that this broad definition of health applied after viability and thus required the state to allow abortion for any of these factors. *Thornburgh*, 737 F.2d at 299. The court claimed that "the Pennsylvania legislature was hostile to this definition" in its adoption of the limiting definition in Section 3210(b). *Id.* The court below relied "with confidence on the Supreme Court of Pennsylvania to construe 'health' as does the Supreme Court of the United States [in *Doe v. Bolton*]." *Id.*

A. The *Doe v. Bolton* Definition of Health Applies Only in Early Pregnancy

In *Doe v. Bolton*, appellants argued that the Georgia statute, as it had been left in the wake of the District Court's decision in the case, was unconstitutionally vague. Their argument was that, even though the specific legal justifications for abortion in the Georgia statute had been stricken by the District Court, the state law still made it a crime for a physician to perform an abortion except when it was "based upon his best clinical judgment that an abortion is necessary." 410 U.S. at 191. The appellants contended that the word "necessary" did not warn the physician of the conduct proscribed, that the statute lacked objective standards and was susceptible of several constructions, and that the conduct of doctors would be arbitrary because they would err on the side of caution. *Id.*

This Court upheld the determination of the District

Court in *Doe v. Bolton* in light of its precedent in *United States v. Vuitch*, 402 U.S. 62 (1971). In *Vuitch*, the vagueness issue was raised in relation to a District of Columbia statute that made abortions criminal unless they "were done as necessary for the preservation of the mother's life or health." Since that statute had been construed to bear upon psychological as well as physical well-being, the Court concluded that the term "health" presented no problem of vagueness. 402 U.S. at 72. This conclusion from *Vuitch*, according to the *Bolton* court, was equally applicable to the Georgia statute. 410 U.S. at 192. Continued the Court:

> We agree with the District Court that the medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

Id.

The *Bolton* court did not address the issue of whether the same liberal definition of health would apply in the context of abortions done throughout pregnancy. Indeed it did not need to do so, because plaintiff Mary Doe was denied abortion under the Georgia law at issue when she was eight weeks pregnant, or well within her first trimester of pregnancy. *Id.*, at 185-186. Thus, the *Bolton* definition of health applied only to early or first trimester abortions and it is far too expansive a reading of the definition to apply it to post-viability abortions, when the state has a compelling interest in the protection of fetal life.

B. When Analyzed in Tandem with *Roe v. Wade*, the *Doe v. Bolton* Definition of Health Does Not Apply to Post-Viability Abortion

Doe v. Bolton should not, indeed must not, be read in isolation. As Justice Blackmun wrote for the Court in *Roe v. Wade*, "[t]hat opinion and this one, of course, are to be read together." 410 U.S. at 165. When read in tandem with *Roe v. Wade*, it is abundantly clear that the *Bolton* definition of health does not apply in the context of post-viability abortions.

The Court in *Roe v. Wade* explicitly rejected the notion that the woman's right to privacy with respect to her decision on whether to terminate her pregnancy is unlimited. "[A]ppellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree." 410 U.S. at 153. Instead, the privacy right of the woman "must be considered against important state interests in regulation." *Id.* at 154. Thus, "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." *Id.* "At some point in pregnancy," continued the Court, "these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." *Id.* "With respect to the State's important and legitimate interest in the health of the mother," noted the Court, "the compelling point, in light of present medical knowledge, is at approximately the end of the first trimester." *Id.* at 163. And "with respect to the State's important and legitimate interest in potential life, the 'compelling' point is viability." *Id.*

In a passage of *Roe* that emphasizes the point that at no time in pregnancy is the woman's abortion privacy right absolute or completely personal in nature, the Court noted that, during the first trimester of pregnancy, "*the attending physician, in consultation with his patient*, is free to determine, without regulation by the state, that, in his medical judgment, the patient's pregnancy should be terminated (emphasis added)." *Id.* at 163. Thus, it is clear that in all three stages of the abortion regulatory framework announced in *Roe*, health considerations, in some fashion, are important.

But this emphatically is not to say that the health considerations recognized by the Court in *Roe v. Wade* are the same, or that they must be given equal constitutional weight, throughout the full nine month term of pregnancy. In the first trimester, the abortion decision "must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. In describing the factors which could be considered legitimately in exercising this "medical judgment," the Court noted:

> Specific and direct *harm medically diagnosable* even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a *distressful life and future. Psychological harm* may be imminent. *Mental and physical health may be taxed* by child care. There is also the *distress*, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already *unable, psychologically* and otherwise, to care for it. In other cases as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Id. at 153 (emphasis added).

Thus, under this broad definition of health, very few abortions are performed for any medical reason. Of the women seeking abortion, only 4.5% of those seeking second trimester abortions and 10% of those seeking first trimester abortions claimed any medical indications. Most seek abortion for social and economic reasons. *See* Appendix B.

Despite the fact that few women have any clinical grounds for abortion, those who perform abortions are willing to find medical indications simply because the pregnancy is early or the patient wants one.[2] Other physicians feel that there is a medical indication to abortion in pregnancy if the woman says, "I can't cope with this pregnancy." Zbaraz, *Abortion and the Supreme Court: A Physician's Fight for Medical Equality*, 4 SEXUAL MED. TODAY 43 (1980). In fact, no more than 2 percent of induced abortions are performed "for clinically identifiable reasons," and no more than 1 percent are performed to save the life of the mother — or for any other purpose related to physical health. *1 Constitutional Amendments Relating to Abortion, 1981: Hearings on Bills Proposing a Constitutional Amendment With Respect to Abortion Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. 158-59 (1981) (testimony of Irwin M. Cushner).

This situation is exacerbated by the fact that it is usually not a physician who is sought out for advice when pregnancy is suspected. Indeed, in one survey, less than 18% sought the advice of any physician when deciding

[2] *See* Testimony of Dr. Hodgson in *McRae v. Califano*, No. 76-C-1804 (E.D.N.Y.), Transcript, August 3, 1977, at pp. 99-101):

A. In my medical judgment every (pregnancy) that is not wanted by the patient, I feel there is a medical indication to abort a pregnancy where it is not wanted.

In good faith, I would recommend on a medical basis, you understand, that, and it would be 100% ... I think they are all medically necessary ...

Occasionally we will advise these women to carry their pregnancy to term. But most of these are medically necessary because I am considering the women's physical, mental, emotional and social and welfare and family and environment and all that ... I am concerned with the quality of life not physical existence ... If the words medically necessary came in I think I could live with it. If I could interpret it in my own way, however.

Q. It would be a good faith interpretation?

A. I could live with it.

whether or not to have an abortion and over 87% reported that the physician had absolutely no influence on their decision. Rosen, *The Patient's View of the Role of the Primary Care Physician in Abortion*, 67 AM. J. PUB. HEALTH 863 (1977). Part of the reason for the low influence rate of physicians is the fact that in abortion clinics the physician generally does not even see the patient until she is on the operating table, prepared for the abortion. Hausknecht, *Free Standing Abortion Clinics: A New Phenomenon*, 49 BULL. N.Y. ACADEMY OF MED. 985 (1973). The physician does not even diagnose the woman's condition before the procedure.

In the second trimester under the *Roe v. Wade* standard, the State's compelling interest in the health of the mother justifies regulations that "are reasonably related to maternal health." 410 U.S. at 164. But the Court suggested that such regulations must be narrowly confined to such matters as qualifications and licensing of medical personnel and facilities involved in the performing of abortions. *Id.* at 163. And, in the third (post-viability) stage, the state's compelling interest in protecting "the potentiality of human life" constitutionally justifies the state in prohibiting abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 164, 165.

Thus, the *Roe v. Wade* model focuses on different "health" considerations in each of its three stages. The distinctions between these differing "health" concerns associated with the three stages of the *Roe v. Wade* model must be accorded special importance because they are of constitutional significance. The mandatory "life or health" exception, which must be applied by the states to allow legal abortions even after the fetus has reached the time of viability and the state has acquired a compelling reason to proscribe abortions, must not be confused with the "health" condition which may justify a "medical judgment" authorizing abortion in the first trimester.

This proposition finds further support in the climactic conclusion about the Texas abortion statute that this Court drew in *Roe v. Wade:*

> Measured against these standards, Article 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life or health of the mother," *sweeps too broadly.* The statute *makes no distinction between abortions performed early in pregnancy and those performed later*, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

Id. at 164 (emphasis added).

To apply the first trimester "health" definition to the mandatory health exception in the post-viability context also would "sweep too broadly" and would make "no distinction between abortions performed early in pregnancy and those performed later." *Id.* Morever, as this Court noted in *Roe v. Wade*, "[s]tate regulation protective of fetal life after viability thus has both logical and biological justifications. If the state is interested in protecting fetal life, *it may go so far as to proscribe abortion* during that period, except when it is necessary to preserve the life or health of the mother." *Id.* at 163-164 (emphasis added). Thus, it is not logical to conclude, as the Third Circuit below did, that this Court would have recognized a state's constitutional power to prohibit post-viability abortions on the one hand only to take it away by means of a broad, all-encompassing "health" exception on the other. As a perceptive analysis of this aspect of the *Roe v. Wade* decision by Professor Wardle has suggested:

> The analytical soundness of reading *Roe* and *Doe* as requiring a post-viability "life or health" exception with an expansive interpretation of "health" is highly questionable. A broad interpretation of this exception would be inconsistent with the deliberate balancing of

> interests that is at the heart of the *Roe* analysis, and would disregard the fundamental distinctions between the "health" concepts associated with the three stages of the *Roe* model. The "health" conditions which constitutionally justify . . . [broad, unregulated access to] abortion during the first trimester are unquestionably much broader than the "health" conditions which constitute the mandatory post-viability "life or health" exception. The fact that *Roe* acknowledged that a "compelling" state interest is thwarted when the post-viability exception is applied mandates a conservative interpretation of this exception. Also, the reason for the imposition, as a constitutional requirement, of the mandatory "life or health" exception to post-viability abortion restrictions has never been stated by the Court, and this, certainly, suggests that it was not intended to be a major exception.
>
> Moreover, if the post-viability "life or health" exception were read in terms of the *Doe* or *Roe* description of the first trimester "health" considerations . . . it would create a classic "Catch-22" situation. . . . It would mean that the Court in *Roe* laboriously created a three-part framework for regulating abortion, emphasized that a woman's right to an abortion is not absolute, declared that after viability the state has a "compelling interest" which generally could justify the prohibition of abortion, and then, *sub silentio*, negated it all with an innocuously-appended exception. In short, an expansive reading of the post-viability "life or health" exception is logically indefensible and is analytically inconsistent with the *Roe* model of abortion regulation.

L. WARDLE, THE ABORTION PRIVACY DOCTRINE: A COMPENDIUM AND CRITIQUE OF FEDERAL COURT ABORTION CASES 14-15 (1980).

C. The Progeny of *Roe v. Wade* also Demonstrate that the *Doe v. Bolton* Definition of Health Does Not Apply to Post-Viability Abortion

The majority opinion in *Colautti* demonstrates further that the *Doe v. Bolton* health definition does not apply to the mandatory health exception for post-viability abortion prohibitions by the states. "*Roe* stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out.... We indicated that *up to the points where important state interests provide compelling justifications for intervention*, 'the abortion decision in all its aspects is inherently, and primarily, a medical decision.' *Roe v. Wade*, 410 U.S. at 166." *Colautti v. Franklin*, 439 U.S. at 387 (emphasis added). Thus, this Court once again drew a clear line between the first trimester regulation-free physician-patient abortion privacy right and a drastically more limited concept of serious physiological health endangerment after the compelling state interest in the protection of fetal life arises after viability.

The Court returns to this point slightly later in *Colautti*. "In these three cases [*Roe v. Wade*, *Doe v. Bolton*, and *Planned Parenthood of Central Missouri v. Danforth*], then, *this Court has stressed viability*, has declared its determination to be a matter for medical judgment, and has *recognized that differing legal consequences ensue upon the near and far sides of that point in the human gestation period.*" *Colautti v. Franklin*, 439 U.S. at 388 (emphasis added). "Viability is the critical point." *Id.* at 389.

After *Colautti v. Franklin*, this Court again made implicit reference to the fact that the *Doe v. Bolton* definition of health does not apply to the post-viability period of pregnancy as recognized in *Roe v. Wade*. In Justice Powell's plurality opinion in *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983), the Court stated that "[m]any

third-trimester abortions in Missouri will be *emergency operations*, as the State permits these later abortions only when they are necessary to preserve the life or health of the woman." *Id.* at 485 (emphasis added). The Court also noted *"those unusual circumstances," id.*, and *"rare situations* where there are *compelling medical reasons* for performing abortions after viability." *Id.* at 484 n. 7. Obviously, if this Court in *Planned Parenthood v. Ashcroft* understood the very broad, nearly unlimited first trimester health standard enunciated in *Doe v. Bolton* to define the mandatory post-viability health exception as well, the Court would not have used the emphasized phrases.

D. This Court Need Not Define the Post-Viability Health Exception In Order to Hold Section 3210(b) Constitutional

If the court below were correct in applying the *Doe v. Bolton* definition of health to the mandatory health exception for post-viability abortions, then that health exception would consume, or negate, Pennsylvania's general rule against post-viability abortions, as justified by its compelling interest in the protection of fetal life. What the court below gives with one hand by upholding Pennsylvania's proscription of post-viability abortions, it takes away with the other hand by misapplying *Doe v. Bolton* so as to rob that prohibition of any force or effect.

In order to reverse the erroneous holding of the court below that Section 3210(b) is unconstitutional, it is not necessary for this Court to define the precise limited parameters of the post-viability health exception. Rather it only is necessary for this Court to determine that the employment of the phrase "significantly greater medical risk" in Section 3210(b) is an appropriate way for Pennsylvania to differentiate between the *Doe v. Bolton* definition of maternal health in the first trimester and the markedly different and more grave nature of the post-viability health exception. That determination will ensure

that the post-viability health exception does not operate to deprive Pennsylvania of the power, pursuant to its compelling interest in the protection of fetal life, to mandate that the physician use an abortion procedure that is most likely to produce a live birth, absent a significantly greater medical risk to the pregnant woman.

CONCLUSION

The Pennsylvania statute requiring a physician to employ a post-viability abortion technique most likely to result in a live birth, unless it also entails a significantly greater medical risk to the pregnant woman, is justified as a reasonable exercise of state power pursuant to the compelling interest in viable unborn life. The exclusion from consideration of the psychological or emotional effect of a live birth in assessing medical risk appropriately limits the definition of post-viability maternal health in accord with this Court's previous decisions. Thus, the Amicus Curiae respectfully urges this Honorable Court to reverse the decision below and declare section 3210(b) constitutional.

Respectfully submitted,

Steven R. Valentine
of the Bar of the
Supreme Court of
Illinois
8029 Edinburgh Drive
Springfield, VA 22153
(703) 455-6125

James Bopp, Jr.
BRAMES, BOPP, HAYNES & ABEL
191 Harding Avenue
P.O. Box 1583
Terre Haute, IN 47808-1583
(812) 238-2421

Attorneys for Amicus Curiae,
National Right to Life Committee, Inc.

Appendices

Neonatal Survival Rate (%) By Gestational Age (Weeks)*

Study#	Years of Study	# of Patients	State	22	24	26	28	30	32	34	36
1[c]	1976-1979	1003	Vt/NH		0 11	36 47	62 73	76 92	92 98	98 96	
2[a]	1977-1980	62	NY		36 38	61 76					
3[a]	1977-1980	136	Mass.		28 10	44 60	92				
4[b]	1974-1980	2803	Colo.		11	55	84		93		99
5[a]	1980-1982	185	Wis.		0	37 37	68 85	82 81	91 100	100 100	100 100
6[b]	1982	619	UK	0	16	39 56	58				
7[c]	1979-1981	2061	Ala.		17 9	18 29	53 57	67 86	92 91	99 94	97 99
9[c]	1979-1984	105	Tex.		0	50 28	67 100	88 100	95		

[a] survival = infants discharged from hospital

[b] survival = alive at 28 days

[c] survival definition unknown

*Some researchers based their gestational estimation on the nearest week, others on the nearest completed week.

Source: Americans United For Life, Chicago

APPENDIX A

1. Philip et al, *Neonatal Mortality Risk for the Eighties: The Importance of Birth Weight/Gestational Age Groups*, 68 PEDIATRICS 122 (1981).

2. Dillon et al., *Aggressive Obstetric Management in Late Second Trimester Deliveries*, 58 OBST. GYN. 685 (1981).

3. Herschel et al., *Survival of Infants Born at 24 to 28 Weeks' Gestation*, 60 OBST. GYN. 154 (1982).

4. Koops et al., *Neonatal Mortality Risk in Relation to Birth Weight and Gestational Age: Update*, 101 J. PEDIAT. 969 (1982).

5. Worthington et al., *Factors Influencing Survival and Morbidity with Very Low Birth Weight Delivery*, 62 OBST. GYN. 550 (1983).

6. Milner et al., *Limit of Fetal Viability*, [Letter] 1 (8385) LANCET 1079 (May 1984).

7. Goldenberg et al., *Survival of Infants with Low Birth Weight and Early Gestational Age, 1979 to 1981*, 149 AM. J. OBST. GYN. 508 (1984).

8. Gilstrap et al., *Survival and Short-Term Morbidity of the Premature Neonate*, 65 OBST. GYN. 37 (1985).

APPENDIX B

MAJOR REASON FOR SEEKING ABORTION GIVEN BY 400 PATIENTS

	Saline (%)	Curretage (%)
School	17.5	7.0
Career, personal freedom	11.5	7.5
Medical complications	4.5	10.0
Financial strain	19.5	15.0
Unmarried	9.0	8.5
Too young	6.0	11.0
Fear of social disgrace	5.0	1.5
Family already completed	3.5	13.5
Shakey relationship with man involved	8.0	9.0
Children too close in age	2.0	4.0
Possession of own children jeopardized	1.0	1.0
Parental advice	2.0	0.5
Never wants children	0.5	1.0
Not fit to be a mother	1.5	3.0
Unwilling intercourse	—	0.5
Plans to marry abandoned	0.5	—
Too early in marriage	—	2.0
Too old	—	1.5
Didn't want to hurt family	4.5	0.5
Other	3.5	3.0

Source: Kerenyi, et al., *Reason for Delayed Abortion: Results of 400 Interviews*, 117 AM. J. OBST. GYN. 299, 307 (1973).